117th Congress, 2d Session – – – – – – – – – – – – House Document 117–109

AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AN AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO

APRIL 14, 2022.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE
29–011 WASHINGTON : 2022

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 11, 2022.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress an amendment to the Federal Rules of Criminal Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rule with committee note; an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2021 report of the Advisory Committee on Criminal Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure are amended to include an amendment to Rule 16.

[*See infra* pp. ___ ___ ___.]

2. That the foregoing amendment to the Federal Rules of Criminal Procedure shall take effect on December 1, 2022, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(G) *Expert Witnesses.*

(i) Duty to Disclose. At the defendant's request, the government must disclose to the defendant, in writing, the information required by (iii) for any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under the second bullet

point in (b)(1)(C)(i) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required by (iii) for testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 on the issue of the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the

witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or

- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The government must supplement or correct its disclosures in accordance with (c).

* * * * *

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(C) *Expert Witnesses.*

(i) Duty to Disclose. At the government's request, the defendant must disclose to the government, in

writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. The time must be

sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the

witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or

- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must supplement or correct the defendant's disclosures in accordance with (c).

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration a proposed amendment to Rule 16 of the Federal Rules of Criminal Procedure, which has been approved by the Judicial Conference. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting (i) clean and blackline copies of the amended rule along with committee note; (ii) an excerpt from the September 2021 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the June 2021 report of the Advisory Committee on Criminal Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(G) *Expert Witnesses.*

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ during its case-in-chief ~~at trial~~, or during its rebuttal to counter

[1] New material is underlined; matter to be omitted is lined through.

testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under the second bullet point in ~~subdivision~~ (b)(1)(C)(~~ii~~) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence at trial~~ on the issue of the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness ~~summary provided under this subparagraph~~ must contain:

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the

defendant has timely disclosed under (b)(1)(C);

- the bases and reasons for ~~those opinions~~ them; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that

information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The government must supplement or correct its disclosures in accordance with (c).

* * * * *

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(C) *Expert Witnesses*.

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the defendant intends to use under Federal Rules of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence~~ during the defendant's case-in-chief at trial, if—:

~~(i)~~ • the defendant requests disclosure under ~~subdivision~~ (a)(1)(G) and the government complies; or

~~(ii)~~ • the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness ~~This summary~~ must contain:

• a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness in the defendant's case-in-chief;

• the bases and reasons for them~~those opinions; and~~

• the witness's qualifications, including a list of all publications authored in the previous 10 years; and

• a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained

information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must

149 supplement or correct the defendant's

150 disclosures in accordance with (c).

151 * * * * *

Committee Note

The amendment addresses two shortcomings of the prior provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

Like the existing provisions, amended subsections (a)(1)(G) (government's disclosure) and (b)(1)(C) (defendant's disclosure) generally mirror one another. The amendment to (b)(1)(C) includes the limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the disclosure obligation to testimony the defendant will use in the defendant's "case-in-chief." Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C), this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current practice in this respect is intended.

The amendment to (a)(1)(G) also clarifies that the government's disclosure obligation includes not only the

testimony it intends to use in its case-in-chief, but also testimony it intends to use to rebut testimony timely disclosed by the defense under (b)(1)(C).

To ensure enforceable deadlines that the prior provisions lacked, items (a)(1)(G)(ii) and (b)(1)(C)(ii) provide that the court, by order or local rule, must set a time for the government to make its disclosures of expert testimony to the defendant, and for the defense to make its disclosures of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party. Deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order.

Items (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leave to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule

16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, items (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications, and a list of other cases in which the witness has testified in the past 4 years. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such

circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Items (a)(1)(G)(iv) and (b)(1)(C)(iv) also recognize that, in some situations, information that a party must disclose about opinions and the bases and reasons for those opinions may have been provided previously in a report (including accompanying documents) of an examination or test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be repeated in the expert disclosure, if the expert disclosure clearly identifies the information and the prior report in which it was provided.

Items (a)(1)(G)(v) and (b)(1)(C)(v) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize two exceptions to this requirement. First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts. Second, the expert need not sign the disclosure if a complete statement of all of the opinions as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for

defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

Items (a)(1)(G)(vi) and (b)(1)(C)(vi) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that, if there is any modification of a party's expert testimony or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that modification or correction.

Agenda E-19
Rules
September 2021

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16 . . . and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Excerpt from the September 2021 Report of the Committee on Rules of Practice and Procedure

* * * * *

Respectfully submitted,

John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Excerpt from the June 1, 2021 Report of the Advisory Committee on Criminal Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: June 1, 2021

I. Introduction

The Advisory Committee on Criminal Rules (Advisory Committee) met on a videoconference platform that included public access on May 11, 2021. Draft minutes of the meeting are attached.

* * * * *

In this report, the Advisory Committee seeks final approval for a proposed amendment to Rule 16 previously published for public comment.

* * * * *

II. Action Item for Final Approval After Public Comment: Rule 16

The proposed amendments to this rule arose from three suggestions that the Advisory Committee consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). With the aid of an extensive briefing session presented by the Department of Justice (DOJ) and a miniconference bringing together experienced prosecutors and defense lawyers, the Advisory Committee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Because the Advisory Committee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Advisory Committee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended subsections (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) generally mirror one another.

A. The Public Comments

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes in the text and the committee note. As described more fully below, after considering these suggestions, the Advisory Committee decided against adopting any of them.

1. Setting a Default Time for Disclosures

Many commenters focused on the amendment's timing for disclosures, which was an issue that the Advisory Committee considered at length during the drafting process. Rather than setting a default date for disclosures, (a)(1)(G)(ii) and (b)(1)(C)(ii) specify that the disclosure must be made "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Although the California Lawyers Association supported this approach, the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the New York City Bar Association (NYC Bar) all urged the Advisory Committee to include a default deadline, though they did not agree on what that deadline should be.

The NYC Bar did not specify a preferred deadline. Noting the variety of deadlines set in other jurisdictions (ranging from 60 days to 21 days before trial), it urged that setting some default date would provide helpful certainty to the parties while allowing the courts discretion to increase or decrease the time period on particular cases. It added that some members took the view that default dates should not be set "too far in advance of trial," so that the government would not have to undertake such discovery in smaller cases that were unlikely to go to trial.

Excerpt from the June 1, 2021 Report of the Advisory Committee on Criminal Rules

The FMJA commented that busy trial judges contending with large caseloads and the demands of the Speedy Trial Act would "appreciate the guidance" of a default deadline, and they suggested a default of 21 days before trial, as well as a requirement that rebuttal experts be disclosed 7 days before trial. Finally, the FMJA commented that some (though not all) of its members expressed concern about allowing deadlines to be set by local rules, which could be a trap for defense lawyers unfamiliar with the local rule.

NACDL agreed that the rule should set a default date for expert disclosures, but it supported earlier default deadlines: no later than 30 days before trial for the initial disclosures, and 14 days before trial for reciprocal disclosures. It argued these earlier deadlines are needed "to minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare." Further, NACDL argued that the rule should require the court to set a case-specific deadline in writing, in order to minimize any risk of confusion or misunderstanding.

During the drafting process, the Advisory Committee carefully considered whether to include a default deadline—and declined to do so. The draft amendment seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule *must* set a specific time for each party to make its disclosures of expert testimony to the other party. These disclosure deadlines, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Because caseloads vary from district to district, the amended rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Finally, under the new Rule 16.1, the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures should consider the parties' recommendations.

Many members initially favored a specific deadline as the best way to ensure that the parties have sufficient time to prepare for trial. After extensive consideration and discussion, however, the Advisory Committee was unable to come up with specific times that would fit every case and comply with the Speedy Trial Act. Given the enormous variation in cases and caseloads, the Advisory Committee decided unanimously to adopt a flexible and functional standard focused on the ultimate goal of ensuring that the parties have adequate time to prepare. Although some defense members had initially pressed for default deadlines, they came to the view that the defense might be benefited by this flexible approach. Some members also suggested that the functional approach would be more efficient since it would avoid the need for motions to adjust the default deadlines in individual cases. Finally, there was significant support for recognizing in the text that individual districts might adopt local rules setting default deadlines.

After considering the NYC Bar, FMJA, and NACDL comments, the Advisory Committee rejected the suggestion that it set a default deadline and reaffirmed its support for the amendment's

flexible and functional approach. Responding to the concern expressed by some FMJA members and NACDL that local rules setting disclosure deadlines would create unnecessary confusion or be an unfair trap for unwary counsel, the Advisory Committee concluded it was reasonable to expect counsel to consult the local rules. Indeed, the amendment itself puts readers on notice that they should check the local rules. Proposed (a)(1)(G)(ii) and (b)(1)(C)(ii) state "The court, by order *or local rule*, must set a time [to make] disclosures." (emphasis added).

2. Deleting the Requirement that the Parties Disclose a "Complete" Statement of the Expert's Opinions

The parallel requirements of (a)(1)(G)(iii) and (b)(1)(C)(iii) require the parties to provide "a complete statement of all opinions" the party will elicit from any expert in its case in chief. In order to underscore the difference between this requirement and that imposed by Civil Rule 26, the California Lawyers Association urged the Advisory Committee to remove the word "complete."

The requirement that a party's statement of its expert's opinions be "complete" goes to the heart of the amendment. The Advisory Committee extensively discussed the requirement of a "complete statement" at its fall meeting in 2019. After discussing the possibility that district judges would mistakenly assume that the amended rule in all respects adopts Civil Rule 26, the Advisory Committee decided to retain the phrase "complete statement" as well as the current statement in the note.

The amendment remedies the problem of insufficient pretrial disclosure of expert witnesses. In doing so it moves criminal discovery closer to civil discovery, though without replicating civil discovery in all respects. On this point, as published, the amended rule reflects a number of delicate compromises that allowed the proposal to receive unanimous support. First, the amendment requires a "complete statement" of the expert's opinions in order to clearly signal the need for more complete disclosures. The Advisory Committee also decided not to require a "report," which some members felt would suggest an unduly onerous requirement. Rather than put a label on the disclosures, the amendment allows the specific requirements set forth in (a)(1)(G)(iii) and (b)(1)(C)(iii) to speak for themselves. Finally, the committee note states that the amendment does not "replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases."

In sum, the requirement for disclosure of a "complete" statement is critical to addressing the problem of insufficiently complete disclosures under the current rule. The Advisory Committee therefore declined to remove it.

3. Enlarging the Required Disclosures

NACDL urged that the Advisory Committee expand the required disclosures to include two additional elements:

- transcripts in the party's possession of any testimony by the witness in the past four years; and

- any information in the government's possession favorable to the defense on the subject of the expert's testimony or opinion or any information casting doubt on the opinion or conclusions.

NACDL also urged that the proposal be amended to require the same disclosures to other stages in the proceedings, including preliminary matters and sentencing.

The Advisory Committee rejected these suggestions for two main reasons. First, the inclusion of some or all of these proposed changes would require further study and republication to obtain public comments, slowing the process by at least one year. Some elements of the proposal would likely be controversial.[1] Second, expanding the scope of the amendment by including additional elements might imperil the consensus enjoyed by the current narrowly targeted proposal.

4. Additional Note Language

Three comments suggested changes in the committee note. The Advisory Committee decided against making them.

a) The FMJA Proposal

The FMJA urged the addition of note language. It expressed concern that the specific limitations for government disclosures in (a)(1)(G)(iii) concerning publications within the past 10 years and testimony within the past 4 years "could be misconstrued as defining the scope of disclosures required by the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland,* 373 U.S. 83 (1963)."

The Advisory Committee concluded that these concerns did not warrant revisions to the committee note. Members viewed it as unlikely that readers would mistakenly believe that the amendment sought to govern the constitutional obligation imposed by *Brady v. Maryland*, or to define the scope of disclosures required by the Jencks Act, now supplemented by Rule 26.2. Indeed, Rule 26.2, which governs *midtrial* disclosures after a witness has testified, includes in subdivision (f) a detailed description of a statement *for purposes of that rule.*

b) The NACDL Proposal

On pages 2-3 of its comments, NACDL described a Tenth Circuit decision, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), ruling that a defendant's expert disclosure must, on its face, be sufficient to withstand a *Daubert/Kumho Tire* challenge. NACDL proposed language stating that the amendment:

> should not be read as a requiring that the disclosure must itself be sufficient to allow the expert's option to pass muster under [*Daubert* and/or *Kumho Tire*] or otherwise

[1] Indeed, NACDL implicitly recognizes that its proposal would be in conflict with 18 U.S.C. § 3500 and Rule 26.2, and specifies that the proposed disclosure would be required notwithstanding Rule 26.2 and any contrary statute.

> conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see, e.g.*, *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert's opinion, so as to permit that party to file an appropriate motion, if it so chooses.

For a variety of reasons the Advisory Committee chose not to include this language in the note. First, the Advisory Committee previously decided not to detail the differences between civil and criminal discovery in the committee note. Second, as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended. Finally, the reporters expressed concern that the *Nacchio* case was not in fact on point, and they urged the subcommittee not to include this citation.

c) The Department of Justice

Mr. Wroblewski relayed a concern from the Drug Enforcement Administration (DEA) regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The DEA expressed concern that this language might be interpreted "to require the government to identify every publication, regardless of relevance, including sensitive intelligence documents published within a law enforcement component, within the DOJ or within the executive branch, for example even classified scientific papers provided to the White House or the CIA could conceivably be included." In research to explore this concern, Mr. Wroblewski found little case law defining the term "publication" under the Civil or Criminal Rules. The few cases that did address the definition of "publication" focused on disclosure of the information to the public, and the common meaning of the term "publication" seems to exclude internal materials not available to the public.[2]

The DEA's concerns arose from the common use of the term "publication" to refer to the circulation of internal documents within the executive branch. Mr. Wroblewski suggested the adding language to the committee note to reassure government entities that use of the term "publication" does not include internal circulation.

Although the subcommittee recommended note language to address the DEA's concern, the Advisory Committee decided against including it. For two reasons, members concluded that note language carving out "internal government documents" was neither necessary nor desirable. First, nobody thought that the courts would construe the amended rule to include internal government documents. The term "publication" has long been included in Civil Rule 26, and no one knew of any case in which it had been applied to internal government documents. Second, the inclusion of a carve-out would wrongly imply that absent this limitation the term "publication" was broad enough to include internal documents that had never been released publicly. After discussion, the DOJ's representatives declined to press for the change, noting that the concerns cited by various members were legitimate.

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[2] *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "publication" as "the act of declaring or announcing to the public," and in the context of copyright law "offering or distributing copies of a work to the public").

[B.] Clarifying Changes Made During and After the Meeting

In response to issues raised at the meeting, the Advisory Committee made several clarifying changes. Most were made during the meeting, but one set of issues was set aside for further consultation with the style consultants.

[1.] Changes in (a)(1)(G)

On lines 18-19, the Advisory Committee corrected a cross reference to a request for discovery "under the second bullet point in subdivision (b)(1)(C)(ii)." The style consultants were helpful in determining how the bullet could be cited.

On lines 25-28, the Advisory Committee moved the phrase "at trial" to parallel its placement on line 11, so that both refer to "use at trial." On lines 27-28 it deleted as superfluous the phrase "as evidence," since use under Federal Rule of Evidence 702, 703, or 705 would necessarily be as evidence.

The Advisory Committee considered at length the remaining differences between the first and second sentences in this subsection, and it found no reason to make additional changes. The first sentence currently limits the government's general disclosure obligation to expert testimony it intends to use in its "case-in-chief." The amendment adds the requirement that the government also disclose expert testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." The addition of a requirement that the government disclose this specified rebuttal evidence responded to one of the major concerns practitioners raised at the miniconference. The second sentence, which governs disclosure of expert testimony concerning the defendant's mental condition, fits into a specialized disclosure regime under Rule 12.2. Because the government would not necessarily address a potential insanity defense in its case-in-chief, the current text refers to testimony the government intends to use "at trial." During the process of studying the proposed amendments, the Advisory Committee received no comments that there were any problems with pretrial disclosure in the cases governed by this sentence, and it concluded that the best course was to leave that language unchanged.

[2.] Clarifying Changes to Distinguish Between General Disclosure Obligations and Disclosures Regarding Specific Expert Witnesses

At the meeting, Judge Bates raised a concern about potential confusion from the use of the word "disclosure" in a collective sense (a disclosure that itself includes multiple disclosures regarding individual witnesses) as well as to refer to a disclosure for a particular witness. As he noted, the government may have multiple witnesses, with separate disclosures for each. In addition, disclosures for some government experts must be made at a different time than disclosures for others. A disclosure for a rebuttal witness is required only after the defendant makes a disclosure under (b)(1)(C) (which will be after the government has made its disclosure of evidence it intends to use in its case-in-chief). Finally, disclosure of mental health witnesses may take place at a separate time, potentially creating a third different disclosure deadline (although it will often be the same time as government rebuttal witnesses). Similarly, the defense may have multiple experts, and may make disclosures at different times.

Whether this language needed revision was unclear at the meeting. No comments during the process leading up to publication or received during the comment period raised this issue, and the context seemed to make it clear that (a)(1)(G)(ii) referred to all of the witness disclosures, while (a)(1)(G)(iii), (iv), (v), and (vi) referred to the required disclosures regarding individual witnesses. For example, one witness could not be expected to sign a disclosure that includes information about the statements to be made by other witnesses.

After consultation with the style consultants, however, clarifying language was developed to address Judge Bates's concern. The changes distinguish the parties' general disclosure obligations—in parallel items (i), (ii) and (vi)—from the requirements for a disclosure for a particular expert witness—in items (iii), (iv), and (v). Although the changes were intended to be stylistic only, they were circulated to the Advisory Committee by email asking members to raise any concerns or objections. None were raised.

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